



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 643/2021

In the matter between:

AFRICAN TRANSFORMATION MOVEMENT

APPELLANT

and

**THE SPEAKER OF THE NATIONAL
ASSEMBLY**

FIRST RESPONDENT

**THE PRESIDENT OF THE REPUBLIC
OF SOUTH AFRICA**

SECOND RESPONDENT

AFRICAN NATIONAL CONGRESS

THIRD RESPONDENT

DEMOCRATIC ALLIANCE

FOURTH RESPONDENT

ECONOMIC FREEDOM FIGHTERS

FIFTH RESPONDENT

INKATHA FREEDOM PARTY

SIXTH RESPONDENT

FREEDOM FRONT PLUS

SEVENTH RESPONDENT

UNITED DEMOCRATIC MOVEMENT

EIGHTH RESPONDENT

AFRICAN INDEPENDENT CONGRESS	NINTH RESPONDENT
CONGRESS OF THE PEOPLE	TENTH RESPONDENT
GOOD PARTY	ELEVENTH RESPONDENT
AFRICAN CHRISTIAN DEMOCRATIC	
PARTY	TWELFTH RESPONDENT
PAN AFRICANIST CONGRESS OF	
AZANIA	THIRTEENTH RESPONDENT
AL-JAMA-AH	FOURTEENTH RESPONDENT

Neutral citation: *African Transformation Movement v The Speaker of the National Assembly and Others* (Case no 643/2021) [2021] ZASCA 164 (2 December 2021)

Coram: PETSE AP, NICHOLLS and GORVEN JJA and KGOELE and SMITH AJJA

Heard: 3 November 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 2 December 2021.

Summary: Review – rationality – request for vote by secret ballot – discretion of Speaker – requirement that requesting party discharge onus to prove need for secret ballot – no onus on requesting party – Speaker materially misconstruing basis on which to exercise discretion – reviewable – appeal upheld.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Lekhuleni AJ, sitting as court of first instance) judgment reported *sub nom African Transformation Movement v Speaker of the National Assembly and Others* [2021] 2 All SA 757 (WCC):

- 1 The appeal is upheld with costs, such costs to include those occasioned by the employment of two counsel.
- 2 The order of the high court is set aside and the following order is substituted:
 - ‘1 The decision by the first respondent to decline the applicant’s request for the motion of no confidence in the President to be conducted by secret ballot is reviewed and set aside.
 - 2 The applicant’s request for such motion to be conducted by secret ballot is remitted to the first respondent for a fresh decision.
 - 3 The first respondent is ordered to pay the applicant’s costs of suit, such costs to include those occasioned by the employment of two counsel.’

JUDGMENT

Gorven JA (Petse AP, Nicholls JA and Kgoele and Smith AJJA concurring)

[1] This appeal arises from a motion of no confidence in the President of the Republic of South Africa (the President), Mr Cyril Ramaphosa.¹ It was tabled by the appellant in this matter, the African Transformation Movement (the ATM), on 11 February 2020. The basis for the motion was, in essence, the contention of the ATM that State Owned Entities had collapsed on the watch of the President, that he had misled Parliament in stating that there would be no load-shedding but that this had eventuated, and other aspects of alleged poor performance of his role.

[2] Having tabled the motion, the ATM, on 24 February 2020, requested that the first respondent, the Speaker of the National Assembly (the Speaker), hold the vote of no confidence by secret ballot. Salient points raised by the ATM in support of the request were:

‘The learnings from the 2017 Unanimous Judgment of the highest Court in the land, the Constitutional Court in the matter between the United Democratic Movement v Speaker and others were seminal in providing guidance on how the Speaker is to exercise this enormous power, so that rationality is observed.

We take liberty to remind the Speaker about some of the considerations and constraints that the Speaker should take into account in exercising the power to decide whether or not to grant the secret ballot, as per the Constitutional Court judgment in the aforementioned case.

...

Considerations

- That there must be a proper and rational basis which makes the Speaker decide whether the vote in a motion of no confidence against the President should be through an open or secret ballot.

¹ Section 102(2) of the Constitution provides for motions of no confidence in the President. It reads: ‘If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the President, the President and the other members of the Cabinet and any Deputy Ministers must resign.’

- The power that is vested in the Speaker in deciding to grant or not to grant a secret ballot in a motion of no confidence belongs to the people and therefore it must not be exercised arbitrarily or whimsically.
- The Speaker when exercising the power must be guided by the need for effective accountability; what is in the best interests of the people and obedience to the Constitution.
- The Speaker must always consider real possibilities of corruption and whether all Members of Parliament will be able to exercise their votes in a manner that will not expose them to illegitimate hardships.
- The Speaker must also consider whether the prevailing atmosphere is generally peaceful or toxified and highly charged when deciding to grant or deny a secret ballot.

Constraints

- To enhance the accountability obligation of the President.
- To allow members to honour their constitutional obligation without fear.
- To note that the consequences of a dishonest vote are adverse or injurious not so much to the individual member but to our democracy.
- To note that dishonesty in the form of bribes can cause a member not to vote according to his or her conscience.
- To note that anybody including members of Parliament or the Judiciary anywhere in the world could potentially be “bought”.
- “When money or oiled hands determine the voting outcome particularly in a matter of such monumental importance, then no conscience or oath finds expression”.

It is common cause that some members of the governing party may have been persuaded by the solid grounds for the motion of no confidence in President Ramaphosa but may be constrained by party line which in terms of the obligation to their “oath of office and to the people of South Africa” is inconsequential.’

[3] On 26 November 2020, the Speaker advised the ATM that the motion would be debated on 3 December 2021. On 26 November 2020, the ATM telephonically enquired concerning a response to the request that the vote be held by secret ballot. The Speaker then sent a letter dated 5 March 2020 (the

5 March letter), declining the request. She averred that it had been sent to the ATM on that date. The ATM denies having received the 5 March letter prior to 26 November 2020, but nothing turns on this issue. On 27 November 2020, the ATM requested the Speaker to review her decision but, by letter dated 30 November 2020, the Speaker indicated that she stood by her initial decision.

[4] This prompted the ATM to launch an urgent application in the Western Cape Division of the High Court, Cape Town (the high court). A rule *nisi* with the following interim relief was sought:

‘...’

2.1 The decision by the [Speaker declining] the request by the [ATM] to decide the motion of no confidence in the President by secret ballot be and is hereby set aside.

2.2 The request by the [ATM] for a motion of no confidence in the President to be decided by secret ballot, be remitted to the [Speaker] for her to make a fresh decision on the voting mechanism to be used in the parliamentary sitting scheduled for 3 December 2020 which is to commence at 14h00.

2.3 In deciding on the voting mechanism to be implemented . . . the [Speaker] be directed to take cognisance of:

2.3.1 all issues of freeness and fairness;

2.3.2 the individual consciousness of the voter or the individual MP casting the vote rather than the mandate of the political party in which the voter affiliates, and

2.3.3 the [Speaker’s] request that such voting be conducted by way of secret ballot.

....’

[5] It was directed that the application be heard on 3 and 4 February 2021. As a result, the ATM requested that its motion not be tabled so as to await the outcome of the application. The Speaker was cited as the first respondent. A

number of other respondents were cited and served. None of the other respondents opposed the application or took part in the appeal. The matter was heard by Lekhuleni AJ and, after reserving judgment, the application was dismissed with costs on 26 March 2021. The appeal is before us with the leave of the high court.

[6] It was agreed by all that the matter is foursquare a rationality review. In *Ronald Bobroff and Partners Inc v De La Guerre; South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development*,² the Constitutional Court explained the basis for a rationality review:

‘A rationality enquiry is not grounded or based on the infringement of fundamental rights under the Constitution. It is a basic threshold enquiry, roughly to ensure that the means chosen in legislation are rationally connected to the ends sought to be achieved. It is a less stringent test than reasonableness, a standard that comes into play when the fundamental rights under the Bill of Rights are limited by legislation.’

This dictum referenced the matter of *Albutt v Centre for the Study of Violence and Reconciliation and Others (Albutt)*:³

‘The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but

²*Ronald Bobroff and Partners Inc v De La Guerre; South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development* [2014] ZACC 2; 2014 (3) SA 134 (CC); 2014 (4) BCLR 430 (CC) para 7.

³ *Albutt v Centre for the Study of Violence and Reconciliation and Others* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) para 51.

whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution. . . .’

And it was further explained in *Democratic Alliance v President of the Republic of South Africa and Others (Democratic Alliance)*:⁴

‘. . . Once there is a rational relationship, an executive decision of the kind with which we are here concerned is constitutional.’

Significantly for the present matter, it went on to hold:

‘It follows that both the process by which the decision is made and the decision itself must be rational. . . .’⁵

[7] In *United Democratic Movement v Speaker of the National Assembly and Others (UDM)*,⁶ the Constitutional Court spoke on whether a vote by secret ballot is permissible:

‘Both possibilities of an open or secret ballot are constitutionally permissible. Otherwise, if Members always had to vote openly and in obedience to enforceable party instructions, provision would not have been made for a secret ballot when the President, Speaker, Chairperson of the National Council of Provinces and their Deputies are elected. And the Constitution would have made it clear that voting would always be by open ballot.’

It is thus common ground that the Speaker has the power to direct that a vote in the National Assembly be held by secret ballot.

[8] For the purpose of this appeal it is accepted by the Speaker that there is no onus on a requesting party such as the ATM to make out a case for a vote

⁴ *Democratic Alliance v President of the Republic of South Africa and Others* [2012] ZACC 24; 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 (CC) para 32.

⁵ *Democratic Alliance* para 34.

⁶ *United Democratic Movement v Speaker of the National Assembly and Others* [2017] ZACC 21; 2017 (5) SA 300 (CC); 2017 (8) BCLR 1061 (CC) para 60. Sections 86, 52 and 64 of the Constitution read with Part A of Schedule 3 to the Constitution were referenced as authority for the second sentence of the quote.

by secret ballot. The Speaker accepted the finding of the high court on that issue. In my view, as will become apparent from the discussion below, that concession was correct. As such, the parties agreed that that issue is not before us. The only issue on appeal is a narrow one as will become clear in due course.

[9] In the present matter, the objective sought to be achieved is the proper exercise of the discretion of the Speaker in deciding on a request for a vote by secret ballot. The ATM submits that the Speaker failed to appreciate that a party requesting such a vote has no onus to discharge. This, it says, visits her decision with gross irrationality.⁷ Since she failed to appreciate ‘*how* she was to go about making her decision she could not properly and lawfully apply her mind to the merits’.⁸ In such circumstances, the correctness of the ultimate decision is irrelevant.

[10] For this proposition, the ATM called in aid the matter of *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency and Others*.⁹ Here, the Constitutional Court held:

‘This clear distinction, between the constitutional invalidity of administrative action and the just and equitable remedy that may follow from it, was not part of our pre-constitutional common-law review. The result was that procedure and merit were sometimes intertwined, especially in cases where the irregularity flowed from an error of law. This was not, however, a general rule and did not necessarily apply where procedural fairness was

⁷ *Hirt and Carter (Pty) Ltd v IT Arntsen N O and Others* [2021] ZASCA 85.

⁸ ATM’s emphasis.

⁹ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) para 26. See also *Hirt and Carter* fn 7 above.

compromised. Even under the common law the possible blurring of the distinction between procedure and merit raised concerns that the two should be not be confused:

“Procedural objections are often raised by unmeritorious parties. Judges may then be tempted to refuse relief on the ground that a fair hearing could have made no difference to the result. But in principle it is vital that the procedure and the merit should be kept strictly apart, since otherwise the merits may be prejudged unfairly.”¹⁰

That application was brought under the Promotion of Administrative Justice Act 2 of 2000 (PAJA).

[11] *Albutt* also treated procedural fairness as a requirement for rationality in a context where PAJA did not apply. It related to a decision to pardon certain convicted offenders by way of a special dispensation process. *Albutt* held that the victims of the offences were entitled to be heard prior to such a decision being made. It framed the enquiry as follows:

‘. . . The question for determination is reduced to whether the decision to exclude victims from participating in the special dispensation process is rationally related to the objectives that the President set out when he announced the process.’¹¹

The court analysed the facts required to arrive at a decision and held, in developing the reasoning underlying that matter:

‘. . . As with the TRC process, the participation of victims and their dependants is fundamental to the special dispensation process.’¹²

and:

‘. . . It follows therefore that the subsequent disregard of these principles and values without any explanation was irrational. On this basis alone, the decision to exclude the victims from participating in the special dispensation process was irrational.’¹³

¹⁰ References omitted. The quote is from H W R Wade *Administrative Law* 6 ed (1988) at 533-4. The footnote states that ‘[the] remarks are as applicable to our law as they are to English law’.

¹¹ *Albutt* para 52.

¹² *Albutt* para 61.

¹³ *Albutt* para 69.

and finally:

‘. . . Indeed, the context-specific features of the special dispensation and in particular its objectives of national unity and national reconciliation, require, as a matter of rationality, that the victims must be given the opportunity to be heard in order to determine the facts on which pardons are based.’¹⁴

And, as noted above, in *Democratic Alliance*, it was held that the process of arriving at a decision must be rational. It is thus correct, as contended by the ATM, that where the procedure or approach decided on to determine the facts on which a decision is to be based is incorrect, this gives rise to irrationality. The rational connection must, accordingly, be that the chosen procedure will provide the correct facts and circumstances on which to found the decision in question.

[12] The Speaker submitted that, if it is to found a rationality review, the incorrect procedure used must be material to the decision arrived at. I have no difficulty with that proposition. It seems to me that this goes to the heart of the rational connection test. If the decision is founded on a procedure which failed to understand the nature of the discretion to be exercised, this will be material. This was explained in a decision of this court in *Hirt and Carter (Pty) Ltd v IT Arntsen N O and Others (Hirt and Carter)*:¹⁵

‘An error of law can, in appropriate circumstances, found a review in terms of the common law. This is so when the error is material and affects the outcome of the proceedings. . . So too, where it can be said that the tribunal asked itself the wrong question or based its decision on some matter not prescribed for its decision or failed to apply its mind to the relevant issues in accordance with the behests of a statute.’

¹⁴ *Albutt* para 72.

¹⁵ *Hirt and Carter* para 30.

Hirt and Carter follows a long line of cases such as *Hira v Booysen*,¹⁶ where Corbett JA held that our courts draw a distinction between an error of law on the merits and a mistake which causes the decision-maker to fail to appreciate the nature of the discretion or power conferred upon him and as a result the power is not exercised.¹⁷

[13] On the basis of *Hira v Booysen*, the power to make a decision is not exercised if decision makers misunderstand the nature of the discretion afforded them. If the correct legal basis on which to arrive at a decision is misconstrued, the decision cannot be rationally connected to the purpose for which the power to decide is granted. Such a decision is vitiated by irrationality.

[14] Having set out the basic principles governing a rationality review involving procedure, it remains to consider their application to the decision of the Speaker in the present matter. As indicated in *UDM*, the court held that the Speaker has the power to decide whether to hold a vote of no confidence in the President by open or secret ballot. Significantly, it said:

‘But, read together, sub-rules (1) and (3) of rule 104 empower the Speaker to predetermine a manual voting system that may not permit a recordal or disclosure of the names and votes of Members. That is an indiscriminate manual secret ballot procedure. Indiscriminate because it is not limited to the election of the President, Speaker or Deputy Speaker. It is not incident-specific and must thus apply just as well to any incident of voting for which the Speaker may prescribe a secret ballot including the removal of the President. The

¹⁶ *Hira v Booysen* 1992 (4) SA 69 (A).

¹⁷ *Hira v Booysen* at 90.

National Assembly has, through its Rules, in effect empowered the Speaker to decide how a particular motion of no confidence in the President is to be conducted.’¹⁸

The neutrality of the last sentence makes clear that, when a motion of no confidence in the President is to be decided, the Speaker must ‘. . . decide how. . . [it] is to be conducted’. This does not seem to me to presuppose a default position of either an open or a secret ballot. It simply requires a decision on how that particular motion is to be conducted. The slate is clean. *UDM* explains that this involves a judgment call by the Speaker:

‘. . . But, when a secret ballot would be appropriate, is an eventuality that has not been expressly provided for and which then falls on the Speaker to determine. That is her judgement call to make, having due regard to what would be the best procedure to ensure that Members exercise their oversight powers most effectively. . . .’¹⁹

The crisp issue in this matter is whether the Speaker correctly approached the matter in order to make that judgment call.

[15] In this regard, the Constitutional Court mentioned certain factors to be taken into account by the Speaker, as well as some constraints. The bedrock principle is that members of the National Assembly:

‘. . . are required to swear or affirm faithfulness to the Republic and obedience to the Constitution and laws. Nowhere does the supreme law provide for them to swear allegiance to their political parties . . . in the event of conflict between upholding constitutional values and party loyalty, their irrevocable undertaking to in effect serve the people and do only what is in their best interests must prevail’²⁰

This, in turn, means that, in a motion of no confidence:

‘Each Member must, depending on the grounds and circumstances of the motion, be able to do what would in reality advance our constitutional project of improving the lives of all

¹⁸ *UDM* para 67.

¹⁹ *UDM* para 68.

²⁰ *UDM* para 79, citing s 48 of the Constitution read with item 4 of Schedule 2.

citizens, freeing their potential and generally ensuring accountability for the way things are done in their name and purportedly for their benefit. So, the centrality of accountability, good governance and the effectiveness of mechanisms created to effectuate this objective, must enjoy proper recognition in the determination of the appropriate voting procedure for a particular motion of no confidence in the President. That voting procedure is situation-specific. Some motions of no confidence might require a secret ballot but others not, depending on a conspectus of circumstances that ought reasonably and legitimately to dictate the appropriate procedure to follow in a particular situation.’²¹

[16] As soon as one says that the decision on a voting procedure is ‘situation-specific’ and involves a ‘conspectus of circumstances’, it implies a fresh consideration on each occasion such a vote is called for. This, again, shows that a neutral point of departure is appropriate.

[17] With that backdrop, the approach taken by the Speaker to exercise her discretion must be evaluated. In order to do so, the reasons given by the Speaker for her decision must be examined. These were given on three different occasions. Two were contained in the 5 March letter and that of 30 November 2020 and the third in her answering affidavit. It is worth quoting excerpts from the 5 March letter and the answering affidavit which bear on her approach in arriving at the impugned decision.

[18] The Speaker said, in the 5 March letter:

‘The Constitutional Court has indicated that a secret ballot becomes necessary where the prevailing atmosphere is toxified or highly charged. You have not offered proof of a highly charged atmosphere or intimidation of any member(s) in this particular case.’

²¹ UDM para 83.

The 5 March letter also contended that the ATM had ‘not proffered concrete evidence that members would deviate from’ their ‘oath of faithfulness to the Republic and obedience to the Constitution and laws’.

[19] The following relevant averments are found in the answering affidavit: ‘In the first instance, the ATM is the subject of an onus to place sufficient reasons or evidence before me that would constitute compelling reasons for me to exercise my discretion in its favour.

In the absence of such compelling reasons or evidence, any Member, if the ATM’s conduct is to be accepted, would be able to force a motion of no confidence to be held by secret ballot relying solely on their *ipse dixit*, the consequence of which would be to render nugatory the discretion afforded to me.’

And, later:

‘What the Court should not lose sight of more than anything else is that the ATM itself bore a burden to place cogent and compelling reasons before me as to why secrecy on the facts of this case was justified.’

Further:

‘Moreover, the ATM did not and cannot present a single shred of evidence that demonstrates a reasonable basis for a secret ballot. It relies on unsubstantiated and speculative claims to justify a secret ballot.

I am advised that if the ATM is correct, it would make a mockery of what the Constitutional Court held in the *UDM* case.

This is because by simply asking for a secret ballot – without presenting any objective reasons justifying same, as the ATM has done in these proceedings – my discretion will be reduced to a rubber stamp and I will be compelled to grant it.’

[20] What is clear from these responses is that the Speaker held the view that the ATM bore an onus to show the need for a secret ballot by producing evidence or reasons for that procedure to be adopted. It is clear that she did

not understand her need to approach the motion of no confidence by deciding ‘. . . what would be the best procedure to ensure that Members exercise their oversight powers most effectively. . .’.²² She did not set out to determine ‘. . . the appropriate voting procedure for [that] particular motion of no confidence. . .’.²³ She did not have as her point of departure that ‘. . . some motions of no confidence might require a secret ballot but others not, depending on a conspectus of circumstances that ought reasonably and legitimately to dictate the appropriate procedure to follow in [that] particular situation’.²⁴

[21] The imposition of an onus on a party requesting that a vote of no confidence be held by secret ballot is a fundamentally flawed approach to the exercise of the discretion of the Speaker. She asked the wrong question. It was ‘has the ATM discharged the onus to convince me to decide that a vote by secret ballot should be held’. That question implied a point of departure that, absent the discharge of such an onus, a vote of no confidence in the President should be by open ballot. She did not ask ‘what would be the best procedure to ensure that Members exercise their oversight powers most effectively’ as regards this particular vote of no confidence, given a conspectus of the reasonable and legitimate circumstances obtaining at that time which could assist in arriving at that decision. She laboured under a misconception that, if a requesting party did not have to discharge an onus, any request for a secret ballot had to be approved. This shows that she misunderstood the nature of the discretion to be exercised. The incorrect procedure of requiring the ATM to discharge an onus was material to the resulting decision.

²² *UDM* para 68.

²³ *UDM* para 83.

²⁴ *Ibid.*

[22] There was thus a failure to exercise the discretion accorded to her. All of this demonstrates that the decision of the Speaker was vitiated by irrationality. As such, the high court should have reviewed and set aside her decision. This all means that the appeal should be upheld.

[23] It was conceded by the Speaker that there was no reason why costs, either in this Court or in the high court, should not follow the result. Nor can I think of any.

[24] In the result, the following order issues:

- 1 The appeal is upheld with costs, such costs to include those occasioned by the employment of two counsel.
- 2 The order of the high court is set aside and the following order is substituted:
 - ‘1 The decision by the first respondent to decline the applicant’s request for the motion of no confidence in the President to be conducted by secret ballot is reviewed and set aside.
 - 2 The applicant’s request for such motion to be conducted by secret ballot is remitted to the first respondent for a fresh decision.
 - 3 The first respondent is ordered to pay the applicant’s costs of suit, such costs to include those occasioned by the employment of two counsel.’

T R GORVEN
JUDGE OF APPEAL

Appearances

For appellant: A Katz SC (with him M Mhambi)

Instructed by: MB Magigaba Attorneys, Durban
Matsepe Attorneys, Bloemfontein

For first respondent: K Premhid

Instructed by: State Attorney, Cape Town
State Attorney, Bloemfontein

For second to fourteenth
respondents:

No appearance